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No. 82-

Office - Supreme Court, U.S.
FILED
JUL 16 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals improperly held that the Commission's guidelines encouraging applications for broad grants of new motor carrier operating authorities were in fact rules which were invalid under the Motor Carrier Act of 1980.

2. Whether the court of appeals improperly held that the Commission's guidelines for the reasonable broadening of existing motor carrier operating authorities were in fact rules which were invalid under the Motor Carrier Act of 1980.[1]

3. Whether the court of appeals improperly intruded upon the agency's discretion to interpret in the first instance, and to implement by policy, rule, and individual adjudication, the liberalized licensing provisions of the Motor Carrier Act of 1980.

4. Whether the writ of mandamus issued by the court of appeals, clarifying its earlier decision and ordering the Commission to decide all operating rights cases in accordance with its prior mandate, was proper.

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[1] This issue is also raised in isolation in the Commission's request for a writ of certiorari in *Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 82-41, filed July 9, 1982.

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v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The October 1, 1981 decision of the court of appeals (as modified by the rehearing decision of October 23, 1981) is reported at 659 F.2d 452 (App. A, 1a-60a). The initial mandate of the court of appeals was issued on November 13, 1981 (App. B, 61a-62a). The February 25, 1982 decision of the court of appeals granting, in part, the petition for a writ of mandamus is reported at 669 F.2d 957 (App. C, 63a-83a). Rehearing was denied by the court of appeals on March 9, 1982 and a Statement of Reasons issued March 10, 1982 (App. D, 83a-86a). The March 30, 1982, decision of the court of appeals denying, in part, the request for a writ of mandamus is

at 673 F.2d 82 (App. E, 87a-98a). Associate Justice White's stay of the court's February mandamus decision is unreported, but is appended as Appendix F, 99a-100a.

The notice of proposed Commission policies and rules in Ex Parte MC-142 (Sub-No. 1) was published at 132 M.C.C. 114 and 45 F.R. 61,326 (App. G, 101a-132a), and the final policies and rules in that proceeding were published at 132 M.C.C. 374 and 45 F.R. 86,747 (App. H, 133a-192a). The Commission's notice of proposed statement of general policy in Ex Parte 55 (Sub-No. 43A) appears at 45 F.R. 45,545 (App. I, 193a-222a) and the final policy was published at 45 F.R. 86,797 (App. J, 223a-280a).

JURISDICTION

Because the February 1982 decision of the court of appeals modified its October decision and mandate, under 28 U.S.C. § 2101(c) the 90-day period for filing a timely petition for certiorari as to the merits of the full controversy commenced when the court of appeals issued its February 25, 1982 decision. (See discussion *infra*, 17-19). By orders of May 17, and July —, 1982, (App. M) Associate Justice White extended the time for filing this petition to July 9, and July 16, 1982, respectively. (App. M, 317a-318a).

The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 1651(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (49 U.S.C. §§ 10101 *et seq.*). are set forth in Appendix K, 281a-310a. The pertinent regulations and policies are set forth in Appendices G through J, identified directly above.

I.

STATEMENT

A. Nature Of The Case

This case involves implementation of the Motor Carrier Act of 1980 (the 1980 Act), enacted on July 1, 1980.[2] The 1980 Act directed the Interstate Commerce Commission to promote competition in interstate motor carriage by relaxing the licensing requirements for carriers proposing to serve the public and by permitting existing carriers to obtain more comprehensive operating authorities.

After appropriate public notice and comment, the Commission established, in December 1980, procedural rules and policy guidelines encouraging (a) new applicants to apply for broader authority than had traditionally been authorized, and (b) existing authority holders to seek removal of restrictions from and broadening of previously-issued narrow authorities.

The already-established trucking interests, represented by the American Trucking Associations, the Teamsters, household goods carriers, and several individual trucking companies, challenged the Commission's new policies in the United States Court of Appeals for the Fifth Circuit.

In October 1981 the court of appeals issued a decision holding that the agency's guidelines encouraging carriers to seek broader, more competitive operating authority were, in fact, rules and as such invalid as exceeding the mandate of the 1980 Act. The court of appeals found the legislative history of the 1980 Act confusing and substituted its judgment for that of

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[2] Pub. L. No. 96-296, 944 Stat. 793.

the Commission as to how the 1980 Act should be interpreted.

Although the court's decision was not clear as to how it was to be applied to individual decisions among the thousands of diverse applications processed by the Commission annually, the agency sought in good faith to comply with the court's mandate as it perceived it.

For months, the Commission and petitioners below debated the proper application of the court's decision. In January 1982 the petitioners below, in the belief that their interpretation of the October decision was the correct one, returned to the court of appeals (a) to have their interpretation held to be the correct one, and (b) to have the court issue a writ of mandamus ordering the agency to take actions consistent with that interpretation. The Commission responded that it would welcome a resolution by the court of the ambiguities in the earlier decision, but that a mandamus order would be inappropriate.

On February 25, 1982, the court of appeals issued a writ of mandamus for the express purposes of (a) clarifying its mandate by resolving ambiguities in its first decision, and (b) ordering the Commission, under threat of contempt sanctions, to comply with its decision, as clarified, beginning March 8, 1982.

Faced with the threat of contempt sanctions, the Commission asked the court below to stay the writ of mandamus pending the agency seeking a writ of certiorari from this Court. The lower court denied that request, on March 9, 1982. The Commission then filed with Supreme Court Associate Justice Byron R. White a petition for a stay of the writ of mandamus pending review on certiorari. By decision of March 29, 1982 Associate Justice White granted the stay request.

By this pleading the Interstate Commerce Commission respectfully petitions the Court for a writ of cer-

tiorari granting review on the merits of the October 1981 and February 1982 decisions.

B. Background

Because this case involves the appropriate means of implementing the Motor Carrier Act of 1980, it is helpful to review the background to this legislation.

1. *Prologue*

The Commission has regulated interstate motor carriage since the enactment of the Motor Carrier Act of 1935 (1935 Act). The 1935 Act was a product of the 1930's Depression. Through restrictive licensing, the 1935 Act was designed to provide a "restraining hand"[3] on the "[c]utthroat competition among truckers"[4] that existed at that time. See *Drum* v. *United States*, 368 U.S. 370, 374-375 (1962).

During the last twenty years, however, it became apparent that a "restraining hand" on interstate motor carriage was no longer productive, but rather that additional competition should be promoted.[5] To

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[3] Comments of Senator Wheeler accompanying his bill S. 1629; S. Rep. No. 482, 74th Cong. 1st Sess. Also see similar comments of Senator Terry, 79 Cong. Rec. 12,209, July 31, 1935.

[4] Ari and Olive Hoogenboom, *A History of the ICC: From Panacea to Palliative*, p. 130 (1976).

[5] See, *Bowman Transp.* v. *Arks.-Best Freight System*, 419 U.S. 281, 297-299 (1974); *May Trucking Co.* v. *United States*, 593 F.2d 1349, 1355-1356 (D.C. Cir. 1979); *P.C. White Truck Line, Inc.* v. *ICC*, 551 F.2d 1326, 1328 (D.C. Cir. 1977); *Trans-American Van Service, Inc.* v. *United States*, 421 F. Supp. 308, 323-324 (3-Judge D.C. N.D. Tex. 1976); *Liberty Trucking Co., Ext.—Gen. Commods.*, 130 M.C.C. 243 (1978), 131 M.C.C. 573 (1979), *aff'd, Assure Comp. Transp., Inc.* v. *United States*, 629 F.2d 467 (D.C. Cir. 1980).

facilitate achieving this objective Congress enacted the Motor Carrier Act of 1980.

2. *The Motor Carrier Act Of 1980*

The new law differs markedly from the 1935 Act in that it embodies a "presumption in favor of entry and competition." (Statement of Senator Cannon, 126 Cong. Rec. S7684 (June 20, 1980)). Its passage marked "the beginning of a new era in which those who feel that they have a service to offer to the public have an opportunity to do so." (Statement of Senator Packwood, 126 Cong. Rec. S7685 (June 20, 1980)). The House Committee on Public Works and Transportation summarized the competitive benefits of the legislation (H. Rep. No. 96-1069, 96th Cong. 2d Sess., at 3) (Emphasis added):

> *The legislation establishes a new Federal policy which is to promote a competitive and efficient motor carrier industry* in order to accomplish certain goals. Those goals include meeting the needs of shippers, receivers, and consumers; allowing price flexibility; encouraging greater efficiency, particularly in the use of fuel; and providing service to small communities.
>
> The bill offers increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their services.

The mandate of the 1980 Act is to reduce unnecessary federal regulation [6] and to promote competitive and efficient carrier service.[7]

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[6] Section 2 of the Act expressly mandates reduced regulation.

[7] Section 4 of the Act codified, as part of the National Transportation Policy (49 U.S.C. 10101(a)(7)), the mandate to promote "competitive and efficient transportation services."

To fulfill this objective, Congress directed the Commission to discontinue restrictive licensing by ensuring (a) that all new applicants proposing to offer a useful service responsive to a public need and meeting certain qualifications are granted broad authorities, and (b) that carriers are allowed to broaden their existing restrictive authorities issued under the 1935 Act. The Congressional intent is clear from the colloquy between Senators Cannon and Packwood on the day the bill was passed by the Senate[8] (126 Cong. Rec. S7685, June 20, 1980):

> Mr. CANNON. * * * In addition, I would think the Commission should read the new entry standards in conjunction with the restriction removal section. In other words, the grants of authority under the new law should not continue to be the extremely narrow geographic and commodity grants that are noted throughout the hearing record. Under the restriction removal section, existing carriers have the opportunity to rationalize their operating authority and be able to serve wider areas and carry more commodities. Certainly, we would expect no less for new applicants.

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[8] Evidence of a substantively identical pro-competitive intent by the House of Representatives is found in H.R. Rep. No. 96-1069, 96th Cong., 2d Sess., p. 14 (1980). In its October and February decisions, the lower court disregarded the legislative history from the floor debates because the court found it unclear and conflicting. (659 F.2d at 459). The court of appeals further suggested that resorting to legislative history was unnecessary in view of what it considered to be the plain meaning of the statutory language. (But see, *e.g.*, *Train* v. *Colorado Public Interest Research Groups, Inc.*, 426 U.S. 1, 10 (1976)). Nevertheless, the court itself relied several times in its October decision on the legislative history to support its conclusions.

Mr. PACKWOOD. I would certainly agree with that. I would be terribly disappointed to see a continuation of the restrictive type of certificates that so many carriers have now.

C. The Agency's Implementation Of The 1980 Act

To meet the requirements of the 1980 Act the Commission commenced two proceedings: (1) Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions, Motor Car. of Prop.*, 45 F.R. 61,326 (App. G, 101a-132a), to facilitate the removal of operating restrictions and to otherwise broaden existing unduly restrictive authorities; and (2) Ex Parte No. 55 (Sub-No. 43A), *Acceptable Forms of Requests for Operating Authority*, 45 F.R. 45,545 (App. I, 193a-222a), to provide guidance to applicants for new operating authority by announcing the agency's policies under the 1980 Act.

After analyzing the public comments received, the Commission adopted final rules and policies (discussed below) in December 1980—in Ex Parte No. MC-142 (Sub-No. 1) at 45 F.R. 86,747 (App. H, 133a-192a) and in Ex Parte No. 55 (Sub-No. 43A) at 45 F.R. 86,798 (App. J, 223a-280a).

1. *Restriction Removals*

In Section 6 of the 1980 Act, codified at 49 U.S.C. 10922(h)(1), Congress instructed the Commission to allow existing carriers greater operational freedoms and more opportunities to compete by reasonably broadening commodity classifications and geographic descriptions, and otherwise eliminating unnecessary operating restrictions from their licenses. However, Congress provided only two instances of restrictions

that must be removed.[9] As to other restrictions which should be removed, and the commodity and territorial descriptions which should now be used, the Commission is to apply its own expert judgment (45 F.R. at 61,327 colm. 3; App. G, 108a-109a).

In Ex Parte No. MC-142 (Sub-No. 1), the Commission invited public comment on appropriate commodity and territorial descriptions, among other matters. (*Id.* at 61,328 colm. 3—61,330 colm. 1, 112a-119a). It proposed regulations governing the form and filing requirements for restriction-removal applications, as well as guidelines[10] outlining types of operating restrictions which the Commission envisioned should be removed.

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[9] To comply with the specific directives, the Commission stated (1) that a regular-route carrier providing service between two points could serve all intermediate points as well (App. H, 129a; § 1137.22), and (2) that carriers authorized to provide service only in one direction could and should apply for roundtrip authority (*Id.* § 1137.23).

[10] The Commission, in proposed rule § 1137.20 (45 F.R. at 61,332 colm. 1; App. G, 127a), addressed the substantive significance of the guidelines stating:

> § 1137.20 Scope of this subpart.
>
> This subpart contains guidelines designed to assist applicants in filing applications for the removal of operating restrictions. The guidelines indicate certain types of restrictions or operating limitations in operating authorities which the Commission considers, under normal circumstances, to be excessively narrow, wasteful of fuel, inefficient, or contrary to the public interest. *They suggest ways in which some such restrictions might reasonably be eliminated or in which limited authorities might be broadened. The guidelines are not intended to constitute a prejudgment of any individual application.* (Emphasis added).

The proposed guidelines provided that authority to transport specifically named commodities could be expanded to the full class(es) of commodities involved. The applicable class(es) could be drawn from three different sources: (1) the Standard Transportation Commodity Code (STCC)[11]; (2) other classifications set out in *Descriptions In Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 61 M.C.C. 766 (1953); or (3) any broader class description the Commission may have accepted in the past. (These three sources are referred to collectively as the tripartite commodity policy.)

The Commission further proposed a policy whereby all commodity restrictions, except those against the transportation of household goods[12] and class A and B explosives, on "general commodities" authority would be considered unduly restrictive and removable. As to territorial limits, the Commission proposed to permit carriers holding less than countywide authority to seek expansion of their authority to the full county.

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[11] The STCC source contains 29 broad generic commodity classifications such as furniture and fixtures, building materials, and petroleum and petroleum products. See the full listing in the Ex Parte No. 55 (Sub-No. 43A) Policy Statement (45 F.R. at 86,807 colm. 1; App. J, 264a).

[12] The household goods restriction was proposed to be retained because it appeared at the time that pending legislation would be enacted which would direct separate licensing of household goods carriers. (See discussion in Ex Parte 55 (Sub-No. 43A), 45 F.R. at 4558; App. I, 205a). Later it became evident that no legislation containing such a provision would be passed and, therefore, there was no reason routinely to impose a restriction against household goods carriage. Accordingly, the Commission did not adopt a policy to exclude household goods (45 F.R. at 86,752 colm. 3; App. H, 155a-156a).

The Commission ultimately adopted guidelines that were largely the same as those initially proposed for broadening commodity descriptions (the tripartite method) and for expanding territorial authorizations (from a single point in a county or city to the entire county or city). The final decision permitted carriers holding general commodity certificates, which had historically been restricted against transportation of household goods, to apply to have that restriction removed. (See footnote 12 *infra*).

The Commission's final decision clearly stated that these policies were in no way binding, but were indeed guidelines only, from which the Commission would depart if the evidence pertaining to a particular application warrants. (See final Section 1137.20 at 45 F.R. 86,759 colm. 1; App. H, 127a-128a).

2. *New Authority Applications*

To encourage applications for more broadly based operating authorities consonant with the pro-competitive policies stressed in the 1980 Act, the Commission proposed a general policy statement, in Ex Parte 55 (Sub-No. 43A) (App. I, 193a-222a) setting forth guidelines for future applications. These guidelines were designed to advise prospective applicants of the territorial and commodity descriptions the Commission normally would regard as sufficiently broad. The Commission proposed to use counties and cities as minimum territorial descriptions,[13] but departing

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[13] The territorial guidelines also provided that if a carrier demonstrates a useful transportation service for the 48 contiguous states the Commission would include authorizations for Hawaii and Alaska in order to stimulate increased transportation services to those States. (45 F.R. at 45,549 colm. 1 last paragraph; App. I, 208a-209a).

from the tripartite commodity classification (see p. 10, *supra*) for restriction removals, proposed only to use the STCC categories for new authorities. (45 F.R. at 45,547; App. I, 200a-203a).

The final policy adopted was substantially similar to the original proposal. As in restriction removals, the Commission stated that because no special household goods licensing legislation was enacted, the agency would not routinely exclude household goods from new grants of authority. (45 F.R. at 86,801 colm. 3; App. J, 240a). The most significant change from the original proposal was that, instead of requiring applicants for new authority to use only the STCC categories for commodity descriptions, the Commission stated that those categories simply would be considered guidelines reflective of the Commission's overall objectives. (45 F.R. at 86,801 colm. 2, last full paragraph; App. J, 239a). This the agency made quite clear (45 F.R. at 86,799 colm. 1, 3; App. J, 229a, 231a):

> The major change from our original proposal is our decision not to prescribe the exact form of commodity descriptions. Instead we shall leave to each applicant the selection of a broad description that it believes will best meet its business requirements.
>
> * * * *
>
> [W]e are not prescribing limited lists of acceptable commodity or geographic descriptions. We are, instead, establishing guidelines for acceptable minima . . . . We will accept reasonably broad commodity descriptions in the future, even if they are not the group used in STCC.

The Commission explained that highly restrictive authorities inhibit the most efficient use of carrier equipment and inappropriately curb competitive ac-

tivity. (45 F.R. at 86,798 colms. 2-3, 226a-227a; and 86,800 colms. 2-3—86,801 colm. 1, 233a-238a; App. J). The agency also indicated that excessively narrow or restrictive certificates increase unnecessarily the costs and burdens of regulation by requiring carriers repeatedly to reapply for minor (and usually unopposed) extensions of authority as their operations grow or change. (*Id.*) In addition, the Commission noted the close relation and the need for consistency between both its future licensing and restriction removal policies. The Commission stated (45 F.R. 86,798 colm. 3; App. J, 227a-228a):

> Logic dicates that, if we take these [restriction-removal] actions for carriers with existing authorities we must also assure that future authorities are not subject to the same defects the Congress perceived in our past practices. It is obvious that competition and efficiency on the scale envisioned by the Congress cannot be achieved if we broaden existing authorities, while continuing to grant narrow authorities. We would thereby create a class of competitively disadvantaged carriers (at least initially), which would be entirely inconsistent with the purposes of the Act.

(Also see 45 F.R. at 86,799 colm. 3; App. J, 231a).

The Commission again emphasized that it was issuing guidelines only, from which it would depart in individual cases if the evidence warranted. It clearly stated (45 F.R. at 86,800 colm. 2, 3rd full paragraph; App. J, 234a):

> [W]hat we propose is not mandatory. If an applicant justifies the use of another reasonably broad description of the authority needed, we will allow that description to be used.

D. The October 1981 Decision

The principal arguments brought before the court of appeals were that the Commission exceeded its statutory mandate by requiring or allowing carriers to obtain overly broad operating authorities, and that the Commission's guidelines were actually binding rules, promulgated in violation of the Administrative Procedure Act (APA).

The Commission maintained that, in outlining commodity and territorial "guidelines" that would "normally" be appropriate, it simply had established rebuttable general policy presumptions. The Commission stressed that an applicant or any protestant could rebut those presumptions by presenting persuasive reasons for narrower authority. Additionally, the Commission maintained that, whether considered as policies or rules, its guidelines complied with the APA because it had utilized formal notice and comment procedures.

Notwithstanding the Commission's assurances to the contrary, the court below concluded that the guidelines were not flexible policy but binding rules. (659 F.2d 452, 464; App. A, 28a-29a). The court doubted that the Commission actually intended to apply the guidelines flexibly.[14] The court perceived "sinews of

[14] The court's conclusion that the agency routinely was forcing unwanted authority on applicants was based on a number of ICC *preliminary* findings in several initial Federal Register notices which expanded the scope of applications for new authority to conform to the guidelines even though each applicant had applied for more limited authority. However, in each proceeding cited by the court (*Id.* 471-72 n.99; App. A, 47a-48a) *no final* agency action had been taken. Similarly, the court cited (*Id.*) two cases "docketed" in the Fifth Circuit in which the Commission had granted applications to eliminate restrictions against the transportation of commodities in bulk. The agency had not yet filed its briefs in either of the cited cases.

command beneath the velvet words" professing flexibility. (659 F.2d at 463, App. A, 27a; and see *Id.* at 471-72, App. A, 47a-49a). As rules, however, the court held they were established properly because the notice and comment requirements of the APA had been satisfied.

The court approved, as patently reasonable, the territorial expansion of authority (in new application or restriction removal proceedings) from a single point in a county or city to embrace the entire county or city. (*Id.* at 468 and 473-74; App. A, 39a and 51a-53a). However, it held it to be error for the Commission automatically to include Alaska and Hawaii in authority to serve the 48 contiguous states. (*Id.* at 474; App. A, 54a).

As to the scope of commodities, the court held that the tripartite categories used by the Commission might be, in certain circumstances, too broad, but were nevertheless "a good start". The court gave no guidance on what it would accept as proper descriptions and left in doubt whether the ones selected by the agency simply did not conform to the court's idea of proper descriptions, or whether the court was holding that the Commission could not have any presumptive commodity descriptions at all (compare *id.* at 465 and 472; App. A, 31a and 49a-50a).

The court further stated that no authority should be granted (whether in a new license or through the broadening of an existing one) unless a carrier has affirmatively demonstrated it is fit, willing, and able to handle all commodities within the categories sought.

The court also held that the Commission should not routinely include in general commodities authority (a) commodities in bulk or (b) household goods, unless the applicant demonstrated a specific fitness,

willingness, and ability to perform those two kinds of services. (*Id.* 469, 475; App. A, 40a-41a, and 56a-57a). It was not clear from the October opinion whether the court was using household goods and commodities in bulk as *examples* of how the Commission should treat all distinct services, or whether the court was holding these two motor carrier services to be more specialized than all others and, therefore, entitled to special treatment. (See *Id.* 465-467; App. A, 32a-38a).

After receiving the October decision, the Commission prepared and implemented, by unanimous vote, internal guidelines directing its staff to take actions necessary to ensure uniform compliance with the Court's mandate as the agency perceived it.[15]

E. The Mandamus Decision

The petitioners below believed that the Commission's subsequent actions did not comply with the court's mandate. In January 1982 they requested the court of appeals to issue a writ of mandamus adopting their view of the requirements of the October decision and ordering agency compliance with the court's mandate as so interpreted. They also sought to have vacated all agency decisions issued since October 1, 1981, that failed to comply with their view of the court's mandate.

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[15] Individual Commissioners differed somewhat in their interpretation of the court's decision. Consequently, no motion for a stay of the issuance of the mandate, petition for rehearing, or petition for certiorari of the October decision was filed by the Commission. The four sitting Commissioners at that time consistently split two-to-two on whether to take any such court actions. Under agency internal operating procedures, a tie in the Commission's votes meant no court action could be taken.

In response, the Commission asked that if the court of appeals disagreed with the agency's interpretation of that decision, it clarify its mandate in order to provide needed guidance. The Commission maintained, however, that (a) mandamus would be an inappropriate remedy, and (b) an appeals court could not engage in a wholesale reversal of Commission decisions that were not before the court under properly filed Hobbs Act review petitions.

On February 25, 1982, the court of appeals entered a mandamus decision (669 F.2d 957; App. C, 63a-82a). The court acknowledged the parties' need for clarification (*Id.* 960-961; App. C, 62a-68a). The court then attempted to clarify every substantive aspect of its October decision. Although much of the clarification consisted of simply reciting selected portions of its October decision, the court did resolve some of the more significant ambiguities, either expressly by new discussion, or by inference from the selection of certain portions of its October decision for quotation.

The court clarified that it was not using bulk commodities and household goods as illustrative examples. Rather, the court held that bulk commodities and household goods were the *only two* carrier services that it considered specialized and warranted special treatment.

The court imposed a new requirement by holding, for the first time, that an applicant in a restriction-removal proceeding *must* demonstrate it is specifically fit, willing, and able to provide the requested expanded service to transport commodities in bulk and household goods. (The requirement may be susceptible to a broader interpretation, *i.e.*, that all applicants in restriction-removal proceedings must affirmatively demonstrate their fitness, willingness, and ability to provide the expanded service. (See the Commission's

request for certiorari in *Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 81-41, filed July 9, 1982). Otherwise, the carrier must continue to operate under the restrictive authority granted under the 1935 Act.

The court clarified that an applicant does not already have to possess the requisite equipment to demonstrate fitness and ability. Evidence of past successful operations is sufficient to qualify a carrier as fit and able to perform the desired expanded service.

The court also required the Commission to proceed by rulemaking (rather than by adjudication, as the Commission had elected) and to promulgate replacement rules for those invalidated by its October decision "as soon as practicable" (669 F.2d at 964; App. C, 79a). Additionally, the court directed the Commission to publish a Federal Register notice explaining the court's decision, as clarified, and the current decisional standards to be employed beginning Monday, March 8, 1982.

In addition to resolving several of the significant ambiguities outlined above, the court of appeals specifically held as to restriction removals (*Id.* 961-963; App. C, 72a-76a), the Commission may not authorize the elimination of bulk and household goods exceptions from general commodities authority without requiring a special showing that the applicant is fit, willing, and able to transport those commodities. Moreover, quoting from its October decision, (659 F.2d at 464-65) the lower court stated that every applicant must be permitted (*Id.* 962; App. C, 73a-74a):

> 'to seek some other commodity classification if it can show that use of the tripartite Commission standard would require the transportation of commodities unrelated to those previously authorized or would require the institution of a

> different type of service, and that the carrier is not fit or is unwilling or is unable to provide the service.'

The Commission also must provide some opportunity for "opponents" to enter an appearance and express their opposition. (669 F.2d at 962; App. C, 75a).

As to applications for new authority, the Commission must permit applications "for any reasonably broad commodity authority" and it must require a "fit, willing, and able" showing for "the commodities for which authority is sought" (*Id.* 963; App. C, 76a-77a). No grant of bulk service or household goods can be made as part of a general commodities authorization without a special fitness showing. (*Id.* at 77a). Nor can authority to serve Alaska or Hawaii be granted as part of nationwide authority without a specific showing of fitness and need to serve those states. (*Id.*).

The court limited its February mandamus decision to future Commission actions, reserving action on the request that alleged non-complying licenses issued after October 1, 1981 be vacated. On March 30, 1982, the court issued a further decision denying mandamus relief for past Commission decisions (673 F.2d 82; App. E, 89a-98a).

F. The Stay Of The Mandamus Decision

The Commission considered a stay of the mandamus essential to prevent the prospect of contempt sanctions from so chilling its decision-making activities as to foreclose the agency from deciding hundreds of potentially controversial cases. Notwithstanding Justice White's grant of the stay, the Commission is complying with the basic requirements of the October decision. (See 47 Fed. Reg. 13,603-13,604, March 31, 1982; App. L, 311a-316a)

II.

REASONS FOR GRANTING THE PETITION

This case presents the need for a comprehensive review of the newly-enacted Motor Carrier Act of 1980. The Court's ultimate pronouncements on the breadth of the 1980 Act and the extent to which the Commission may act in promoting competition and efficiency in the trucking industry will guide the agency, the industry, the public, and the bench and bar for years to come.

Additionally, the Court is asked to review an appellate court's mandamus decision which would direct an agency's conduct in discretionary, as opposed to ministerial, actions. The mandamus decision not only compels the agency to undertake a rulemaking proceeding, but also directs how the agency shall decide cases during the interim. This Court's decision would provide guidance to all courts on the appropriateness of mandamus to clarify and enforce decisions relating to the full range of agency actions from regulations to adjudications.

A. The Court Is Asked To Review The Entire Controversy

It is a long-standing tenet of Supreme Court practice that a "writ [of certiorari] will not lie until the whole of the matters in controversy in the suit below are disposed of . . . The cause is not to be sent up in fragments." *Holcombe* v. *McKusick*, (U.S.) 20 How. 552, 554 (1858).[16] This practice conserves the

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[16] See *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258 (1949); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); and *Providence Rubber Co.* v. *Goodyear*, (U.S.) 6 Wall. 153 (1868), all discouraging piecemeal litigation on writs of certiorari to the Court.

time, resources, and energy of the litigants and the courts, and promotes the ends of justice.[17]

Accordingly, in appellate cases where a circuit court issues a second decision in the same case, addressed to a party's request for a variance, alteration, expansion or resolution of a genuine ambiguity of the initial determination, and that subsequent decision substantively clarifies, varies, or alters the initial court decision, the 90-day period for filing for a writ of certiorari as to the entire controversy runs from the date of the second decision. *United States* v. *Adams*, 383 U.S. 39 (1966); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965); *Federal Power Co.* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *Rogers* v. *Hill*, 289 U.S. 582 (1933); compare *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952).

In the instant case the mandamus decision was issued expressly for the purposes of clarification, *i.e.*, to resolve genuine ambiguities in the first decision. Thus, the 90-day time period for filing for a writ of certiorari for Supreme Court review of the controversy ran from the date of the clarification. See *FTC* v. *Colgate-Palmolive Co.*, *supra*. As discussed above, the lower court altered, clarified, and varied its mandate by holding: (a) that household goods and commodities in bulk are the only two commodities that should be singled out for special treatment; (b) that the Commission may not proceed by policy statement or adjudication but only by rulemaking to establish motor carrier licensing policies; (c) that ap-

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[17] See *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974), for the proposition that "finality" and the other rules affecting the appropriateness of petitions for certiorari are not rigid parameters, but are practical doctrines shaped by the equities.

plicants in restriction-removal proceedings must affirmatively demonstrate their fitness, willingness, and ability; and (d) that an applicant can show fitness and ability by evidence of successful past operations instead of possession of equipment and personnel. These holdings were not clear from the October decision.

Thus, the 90-day filing period for certiorari under 28 U.S.C. § 2101(c) ran from the lower court's February 1982 mandamus decision, which addressed the same range of issues as did the October 1981 decision. The entire controversy, the October and February decisions together, is properly reviewable by this Court on this petition for certiorari. As explained below, the issues raised are important and worthy of this Court's review.

B. The Lower Court Intruded Unlawfully Into The Agency's Discretion To Interpret And To Implement The Motor Carrier Act of 1980

This Court has consistently emphasized that the courts must give great deference to the interpretation of a statute by the agency charged with its administration, *especially* in those instances where, as here, the agency (a) is interpreting a new statute for the first time and (b) helped to draft the law. Thus, for example, in *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969), this Court stated:

> While this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction, see *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616 (1965); *Power Reactor Development Co.* v. *International Union of Elec.*, etc., 367 U.S. 394, 408, 81 S. Ct. 1529, 1536, 6 L. Ed. 2d 924

(1961); it is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. See *Power Reactor Development Co.* v. *International Union of Elec.*, etc., *supra; United States* v. *American Trucking Assns.*, 310 U.S. 534, 539, 60 S. Ct. 1059, 1061-1062, 84 L. Ed. 1345 (1940). In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112-114, 67 S. Ct. 133, 145-146, 91 L. ed. 103 (1946).

See also *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964). Most recently this Court reiterated, in a case bearing striking resemblance to the instant case, that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981),[18] quoting from *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Similarly this Court has carefully delineated the appropriate functions of reviewing courts and agencies charged with the administration of economic reg-

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[18] This Court also rejected there (as we ask it to do here, see fn. 8, *supra*) the lower court's reliance on legislative history favorable to its construction while disregarding conflicting, unfavorable legislative history. *FCC* v. *WNCN*, *supra*, 450 U.S. at 598.

ulatory statutes, in a series of decisions commencing with *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).[19] The "guiding principle," as stated in *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), "is that the function of the reviewing court ends when the error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." Procedures which limit the administrative agency's discretion to reconsider its approach to the problem on remand consistently have been found improper because they "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), quoting from *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). The *Chenery* decision is particularly relevant here because this Court held that it would not have been proper to require an agency to abandon adjudication in favor of rulemaking on remand. These principles have been applied by this Court to proceedings involving the Commission on a number of occasions, most recently in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries*, 449 U.S. 607 (1981). See also, *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966); *ICC* v. *Atlantic Coast Line RR Co.*, 383 U.S. 576, 601 (1966); *United States* v. *Jones*, 366 U.S. 641, 652 (1949).

Here the lower court transgressed these legal principles. It did much more than merely declare the agency's rules unlawful, explain the legal defects,

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[19] *Pottsville*, it is worth noting, was accepted by this Court following issuance of a writ of mandamus by the Court of Appeals for the District of Columbia Circuit against the Federal Communications Commission.

and remand the proceedings to the Commission. The court directly compromised the demarcation of functions between court and agency by ordering the agency to proceed by rulemaking to establish proper commodity classifications for motor carrier licenses and by instructing the agency to exclude commodities in bulk and household goods unless the applicant demonstrates a special fitness to transport those commodities.[20]

The intrusion by the court of appeals into the agency's province here is particularly harmful because the court misinterpreted the 1980 Act, reading its legislative mandate too narrowly, and by so doing has hamstrung the agency in its attempt to effectively implement the Act. This Court should take this opportunity, at the initial stages of regulation under the 1980 Act, to settle the controversy over the statu-

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[20] Indeed, a basic factual error in the court's ruling on commodities in bulk is that this really is not a separate commodity but rather only a *method* of transporting commodities. (45 F.R. at 86,807 colm. 2 last paragraph; App. J, 266a). The mandate, as clarified, requires the Commission routinely to insert "bulk" restrictions in authorizations of general commodities. General commodities means *all* commodities; and bulk transportation involves the transportation of commodities in such a state that they are fungible, that is, they are either poured, blown, dumped, or shoveled into the truck with the walls of the truck or the trailer forming the container. Thus, a general commodities certificate restricted against the transportation of commodities in bulk would mean, for example, the agency was authorizing a carrier to transport sand *only* in individualized containers, likewise for the transportation of petroleum, sawdust, coal, talc, and chemicals. No open-dump, liquid-bulk, or pneumatic-bulk trucks could be used. This promotes inefficient and incomplete transportation services, compromises the intent of the 1980 Act, and highlights the problems associated with a court of appeals substituting its judgment for that of an agency having the necessary expertise.

tory directives of that Act. We believe that if the Court examines the merits, it will reverse the decisions below and endorse the Commission's decisions as consonant with the 1980 Act. (If it does so, the various problems associated with unwarranted restrictions upon the agency's implementation of the Act need not be resolved.)

The Commission continues to maintain, as it has throughout, that the guidelines it issued were not only within the mandate of the Motor Carrier Act of 1980, but would rationally achieve the objectives of that Act. The guidelines unquestionably foster broader, more complete authorities and promote competition. The court of appeals concluded, however, that the Commission went too far in promoting those goals, creating policies favoring overly broad grants of authorities. This holding misconstrues the fundamental purpose of the 1980 Act and the Commission's actions in the two proceedings. Compare the Fifth Circuit's decision in this case with the recent decisions of the Eleventh Circuit in *Refrigerated Transport Co., Inc.* v. *ICC*, 673 F.2d 1196 (11th Cir. April 19, 1982), and a different panel of the Fifth Circuit in *Central Freight Lines, Inc.* v. *United States*, 669 F.2d 1063 (5th Cir. 1982).

The Commission's actions certainly promote more efficient use of energy resources, as well as carrier equipment.[21] Expanded authorities will also enable carriers to offer more complete service to shippers.[22]

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[21] The 1980 Act directs the Commission to promote more efficient use of equipment and energy resources. 49 U.S.C. §§ 10101(a)(7)(D); 10922(h)(i)(v); and 10922(h)(2).

[22] The 1980 Act directs the Commission to promote more responsive service to shippers' needs by, among other things, allowing a wider variety of service options. 49 U.S.C. §§ 10101(a)(1)(7)(A) and (B).

Thus, the Commission's actions are harmonious with the 1980 Act and this Court should take this opportunity to affirm the procompetitive mandate of that Act as manifested in the Commission's policy guidelines.

C. The Lower Court Improperly Used Its Mandamus Power To Address Discretionary Agency Functions And To Resolve Ambiguities In Its Earlier Decision

This Court has held that the prerequisites for mandamus are appropriately heavy and that this extraordinary writ should "*hardly* ever!" be issued by an appellate court. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980). The Court requires two basic findings by a court of appeals: (1) that no alternative adequate remedy exists; and (2) that petitioners' asserted right to mandamus is "clear and indisputable." *Id.* 35-36; *Will* v. *United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953). The use of mandamus in this case was wholly inappropriate in several respects.

First, a fundamental prerequisite to the issuance of a mandamus order of this type is a finding that the agency is in fact not complying with the court's mandate. Clearly, the availability of alternative remedies need never be addressed if no violation of the mandate has occurred.

In its February decision the Fifth Circuit concluded only that it "appeared" that the Commission might be violating its mandate and that "if" the Commission were not in compliance, the potential for future litigation would be great. In other words, the court of appeals was not sure if any violation had occurred, but in case there might be violations, the court decided to mandamus the Commission anyway.

Although we welcome the court of appeals' resolution of many of the ambiguities in its October decision, we contend now, as we did before, that clarification by way of a writ of mandamus is highly inappropriate. The Commission cannot be found to have knowingly violated a mandate that was unclear and with which the agency attempted good faith compliance.

Second, it is well settled that a court can only mandamus ministerial duties. That is to say, the court of appeals could have ordered the Commission to decide operating rights cases, but it could not order the Commission to either grant or deny the applications in a specified manner—that is a discretionary matter committed to the agency's expert judgment. It cannot mandamus the final discretionary results. See, *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). As explained, in *Richardson* v. *United States*, 465 F.2d 844, 849 (3d Cir. 1972):

> An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt.

This Court has long recognized the Commission's broad discretion in licensing. See *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945). Clearly, the issues involved here—whether to grant authority to serve Alaska or Hawaii, or to haul commodities in bulk, or household goods—are matters entrusted to the sound judgment and discretion of the Commission. Under these circumstances, mandamus definitely is not "clear and indisputable" or "free from doubt." *Bankers Life & Cas. Co.* v. *Holland*, *supra*, 346 U.S. at 384. As this Court determined in

Allied Chemical Corp. v. *Daiflon, Inc., supra*, 449 U.S. at 36:

> Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'.

The lower court's February mandamus decision should be compared with its subsequent determination, in its March decision (denying mandamus relief as to past Commission decisions) that the prerequisites for mandamus were not established, *i.e.*, petitioners below had failed to show that no alternative remedies were available and that they had a "clear and indisputable" right to the mandamus relief requested. (App. E, 98a). The two decisions cannot be squared. Surely, if the prerequisites for mandamus were not met as to the prior Commission decisions (in which the time for participating in agency proceedings and filing Hobbs Act petitions for review almost assuredly had expired), they definitely have not been met as to all future proceedings.

Third, because the February mandamus order runs to all future licensing proceedings, the mandamus order is defective for overbreadth. As the court held in its March 1982 decision denying mandamus for past actions (*American Trucking Associations, Inc.* v. *Interstate Commerce Commission*, 673 F.2d 82, 85-86 (5th Cir. 1982) (App. E, 87a-98a).

> Congress has not localized appeals from ICC orders as it has done in the case of those administrative appeals for which it desired uniform review. [footnote omitted] We should not arrogate the decision making authority meant to be exercised by other circuits.

Finally, the February decision abridges unlawfully the Commission's discretion to proceed by adjudica-

tion or policy statement, as opposed to rulemaking. The court ordered the agency to promulgate "replacement" rules for those it invalidated. The court's action here would summarily foreclose the Commission from pursuing the same regulatory objectives by other methods. In so doing, it again oversteps its proper function as a reviewing court.

The decision, we submit, should be reviewed by this Court to give additional guidance to lower courts on the proper use of a writ of mandamus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1982

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